IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

76-795

No. .....

MAURICE McKINNEY TAYLOR,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JACK E. SEAMAN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3231

Of Counsel
BROOKS McLEMORE
Attorney General
State of Tennessee

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Table of Authorities

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. . . . . .

MAURICE McKINNEY TAYLOR,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The respondent respectfully prays that the petition for writ of certiorari to review the judgment of the Court of Criminal Appeals of Tennessee be denied.

STATEMENT OF THE CASE

Pursuant to U. S. Sup. Ct. Rule 40.3, 28 U.S.C.A., respondent submits the following statement of the case as only that deemed necessary in correcting any inaccuracy or omission in the statement of the case set forth in the petition for a writ of certiorari.

Mr. James Hunnicutt testified that he was engaged in a firearms business in Atlanta, Georgia (R. 6). On November 16, 1973, he refused to sell firearms to Taylor, the petitioner herein, and two other individuals when they failed to present proper identification (R. 7). On November 17, 1973, he sold to one of Taylor's companions of the previous day three pistols which he identified at trial by serial number (R. 7, 19-26).

On the night of the double homicide, a fingerprint was lifted from a plastic glass in the motel room of one of the victims (R. 121, 124). That print was compared to the prints of Taylor by an identification technician who testified at trial that the lifted print matched the left thumb print of Taylor (R. 174).

The morning of November 29, 1973, Taylor and his two companions were present at the American Airlines Ticket office at a hotel in Memphis, Tennessee, where one of his companions made payment for an airline ticket with a Master Charge card issued in the name of James Widener, one of the homicide victims (R. 248, 249). At 2 p.m. on November 29, 1973, Taylor and his companions were present in a Memphis Sears & Roebuck Store where one of his companions made purchases with a Sears revolving charge card issued in the name of James Widener (R. 256-262).

Prior to the shoot-out at a hotel in Memphis, Tennessee, police officers arrested Taylor's two companions (R. 293). Lt. James L. Harrison arrested Dunn at approximately 3 p.m. on November 29, 1973, after Dunn walked from room number 11 at the Cayce Motel (R. 290-293). Lt. Harrison's partner, Sgt. Sherman Chambers, arrested Mason at the same time and place (R. 339-341). After Dunn and Mason were in custody, the shoot-out began when someone in room 11 at the motel pointed a pistol in the direction of Lt. Harrison and discharged it (R. 296, 297). Numerous law enforcement officials arrived at the motel during the lengthy gun battle which ensued (R. 298). The

gun battle ended after several canisters of tear gas were projected into the motel room and Taylor was forced outside (R. 298, 299). As Taylor exited the motel room, he dropped a pistol just inside the door when he was confronted by a uniformed officer wielding a shotgun (R. 299).

Taylor's pistol was removed from the chair just inside the doorway to room number 11 at the Cayce Motel when the gun battle ended and was admitted into evidence at trial without objection (A. 307-312). The pistol was identified as having fired the three bullets which were recovered from the bodies of the homicide victims (R. 368).

Richard Benjamin Dunn was called as a witness by the State (R. 380). Dunn had the services of retained counsel at the hearing and several times attempted to invoke the Fifth Amendment privilege against self-incrimination. Most often the trial judge disallowed Dunn's assertion of the Fifth Amendment and required him to answer the questions (R. 386, 387, 388, 389, 397). Dunn corroborated the testimony of the gun shop owner as to the purchase of the three pistols and testified that he had given a particular pistol to Taylor (R. 392, 393). Dunn's testimony placed himself, Philip Mason and Maurice Taylor in Nashville, Tennessee, from the 24th to approximately 10:30 p.m. on the 27th of November, 1973 (R. 396, 397, 403, 405). Dunn testified that they left Nashville at Taylor's insistence and over his and Mason's objections (R. 405). They departed Nashville in a blue Lincoln Continental that Taylor told them he had purchased (R. 406). Taylor also said he had obtained some credit cards which Dunn later observed in Taylor's possession and with the name of James P. Widener imprinted on them (R. 406, 407).

On cross-examination, Dunn admitted that he had been indicted by the Davidson County Grand Jury for first degree murder (R. 422). Dunn admitted further that during the week of trial he had confessed to being an accessory after the fact to

murder in the first degree and had received a sentence of from four to seven years (R. 422). Dunn testified he had heard of people being sentenced to confinement for 99 years for the offense of first degree murder and that he had been indicted and awaiting trial for first degree murder for approximately eight and a half months before confessing to being an accessory and receiving a sentence of from four to seven years (R. 424). He admitted he had been convicted in California for the offenses of joyriding and possession of a firearm, a hand pistol (R. 425).

During the course of cross-examination, Dunn's counsel asserted the Fifth Amendment privilege to a question regarding why Dunn left California (R. 426, 427). In response to the assertion of the Fifth Amendment privilege, Taylor's attorney stated, "That answer is satisfactory" (R. 427). Taylor's counsel attempted to question Dunn relative to the purchase of pistols in Atlanta and Dunn's attorney asserted the Fifth Amendment privilege (R. 428, 429, 430). The trial judge threatened Dunn with contempt and required him to answer the questions relating to purchase of the pistols (R. 428, 429, 430).

The only question of Dunn to which the assertion of the Fifth Amendment privilege had been allowed during direct examination related to why he and Mason went to the Nashville Public Library (R. 400). The trial judge allowed Dunn to invoke the Fifth Amendment privilege relative to those same questions on cross-examination (R. 435-437). However, Philip Glen Mason as a witness answered questions relative to why he and Dunn were at the library and testified that they were researching for new identification to change his identity (R. 497). A question by Taylor's counsel as to when Dunn left California was withdrawn when the Fifth Amendment privilege was asserted (R. 439, 440).

Taylor's attorney withdrew a question relative to Dunn carrying a pistol when Dunn's counsel announced that Dunn was under a three count indictment in Memphis including a felony

firearm count (R. 445, 446). Dunn was not required to answer questions relative to using credit cards in the Memphis Sears & Roebuck Store when Dunn's counsel announced that one of the other charges in the indictment was for fraudulent use of credit cards at the Memphis Sears & Roebuck Store (R. 446, 447). Counsel for Dunn announced that there were activities in Memphis about which he did not object to Dunn testifying and that there were only certain activities in Memphis which he would advise Dunn not to answer (R. 448). Taylor's attorney stated that he thought he was entitled to ask any questions and objected to the Court's not allowing him to do so (R. 448). The trial judge overruled a subsequent assertion of the Fifth Amendment privilege and required Dunn to answer a question as to whether or not he had lied in efforts to purchase the three guns (R. 452, 453).

The direct testimony of Philip Glen Mason was essentially the same as that of Dunn; however, Mason's counsel, who was present to advise him during the course of his testimony, did not assert the Fifth Amendment privilege as often as was done during the course of the testimony of Dunn. Mason testified that he left California because he had been arrested and was facing charges of armed robbery (R. 490-493). Mason testified he was not wanted in California with Dunn for fraudulent use of credit cards (R. 494). However, Mason admitted he was wanted in California for possession of explosives (R. 494). Mason testified that he owned a red checked bag (R. 495). The trial judge permitted assertion of his Fifth Amendment privilege to a question whether Mason had used false identification in California upon the representation that Mason was going to be returned to California (R. 498, 499). Mason testified further that he left California while his trial for possessing explosives was ongoing (R. 504, 505). The cross-examination of Mason showed that Dunn and Mason had been confined together for several months prior to Taylor's trial and had discussed the case (R. 508, 509, 510).

BRIEF

Respondent submits that the decision of the Court of Criminal Appeals of the State of Tennessee in this case is correct and should not be reviewed and reversed for the following reasons:

I. Response to Question Presented Number 1.

A. A Conviction May Be Affirmed When Items Seized During a Search Conducted Without a Warrant in Violation of the Fourth Amendment of the United States Constitution Were Admitted Into Evidence Contrary to the Holding in Mapp v. Ohio, 367 U.S. 643 (1963), if the Admission of Such Evidence Was Harmless Error.

In at least three cases, this Honorable Court has applied the "harmless error rule" upon consideration of the admission of evidence seized in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States. The earliest application was in *Stoner v. State of California,* 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964), where the Court was presented with the introduction of evidence seized in an unlawful search of a hotel room. The Court, citing *Fahy v. Connecticut,* 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963), stated as follows:

> There is thus at least "a reasonable possibility that the evidence complained of might have contributed to the conviction." 376 U.S. at 490, 84 S.Ct. at 893.

The second application of the harmless error rule occurred in *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), *rehearing denied,* 400 U.S. 856, 91 S.Ct. 23, 27 L.Ed.2d 94 (1970). Upon considering the admissibility of .38 caliber ammunition seized in a search, the Court in *Chambers* stated:

> Both the District Court and the Court of Appeals, however, after examination of the record, found that if there was error in admitting the ammunition, the error was harmless beyond a reasonable doubt. Having ourselves studied this record, we are not prepared to differ with the two courts below. See Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). 399 U.S. at 54, 90 S.Ct. at 1982.

One year later, in the case of *Whitley v. Warden, Wyoming State Penitentiary,* 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971), the Court reviewed a "half-hearted attempt to argue that the introduction of the illegally seized evidence was harmless error" and found that the error could not be said to be harmless under the "applicable standards," citing *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *Harrington v. California,* 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). 401 U.S. at 569, n. 13, 91 S. Ct. at 1037, n. 13.

The harmless error rule has previously been recognized by this Honorable Court as proper for application to the introduction as evidence items seized in violation of a defendant's Fourth and Fourteenth Amendments constitutional rights. It is submitted that this Court should not now reconsider its earlier rulings and deny application of the harmless error rule in the circumstances of the case under consideration.

The harmless error rule is a reasonable and valid rule which is recognized and applied in every circuit court of appeals to the admission into evidence of items seized in violation of the Fourth and Fourteenth Amendments. *United States v. Anderson,* 533 F.2d 1210 (D.C. Cir. 1976); *Nelson v. Moore,* 470 F.2d 1192 (1st Cir. 1972), *cert. denied,* 412 U.S. 951 (1973); *United States v. LaVecchia,* 513 F.2d 1210 (2nd Cir. 1975); *United States ex rel. Riffert v. Rundle,* 464 F.2d 1348 (3rd Cir. 1972),

cert. denied, 415 U.S. 927 (1973); *Creasy v. Leake*, 422 F.2d 69 (4th Cir. 1970); *United States v. Scheffer*, 463 F.2d 567 (5th Cir. 1972), *cert. denied*, 409 U.S. 984 (1973); *United States v. West*, 486 F.2d 468 (6th Cir. 1973), *cert. denied*, 416 U.S. 955 (1974); *United States v. Quintana*, 508 F.2d 867 (7th Cir. 1975); *Ricehill v. Brewer*, 459 F.2d 537 (8th Cir. 1972); *Dean v. Hooker*, 409 F.2d 319 (9th Cir. 1969); *United States v. Quinones-Gonzalez*, 452 F.2d 964 (10th Cir. 1971).

B. The Standard for Determining Whether the Admission Into Evidence of Items Seized During a Search Conducted in Violation of the Fourth and Fourteenth Amendments Is Harmless Has Been Set Forth by This Court in Harrington, Chapman and Fahy.

This Court has three times stated a rule for determination of harmless error when confronted with an error of constitutional magnitude. Respondent submits that these three pronouncements are of sufficiently identical rules so that the determination of harmless constitutional error has been consistent since the first ruling in 1963. Alternatively, respondent submits that the initial pronouncement is more favorable to a criminal defendant than the subsequent pronouncements. Application of the first standard, which was applied by the Tennessee Court of Criminal Appeals in the instant case, results in a most sound determination of harmless error upon consideration of a constitutional error.

In *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed. 2d 171 (1963), the Court held the admission of evidence obtained in the course of an illegal search to not be harmless error. The standard applied was "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87, 84 S.Ct. at 230. In the following year the Court again applied the standard set forth in

Fahy and again found the admission of such evidence to not be harmless error. *Stoner v. State of California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964).

Thereafter, in a case decided in 1967, the Court did hold admission of items seized in an unconstitutional search to be harmless error. In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Court restated the rule announced in *Fahy* and then, expressly adhering to the *Fahy* decision, held, "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24, 87 S.Ct. at 828. In *Chapman* the Court stated that there was "little, if any, difference" in the Chapman and Fahy standards but that the standard of "reasonable doubt" would be more familiar to and easier to apply by all courts.

The Court again considered this question in *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). The majority in Harrington wrote that they were not departing from *Chapman* or diluting it, but only reaffirming it when they stated:

> The case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt, unless we adopt the minority view in *Chapman* . . . that a departure from constitutional procedure should result in an automatic reversal, regardless of the weight of the evidence. 395 U.S. at 254, 89 S.Ct. at 1728.

A dissent in Harrington by Mr. Justice Brennan joined by the Chief Justice and Mr. Justice Marshall, expressed the belief that the majority had overruled *Chapman* by considering the issue of the substantiality of the evidence and not the effect on the jury's decision caused by the tainted evidence. *Harrington v. California, supra*, 395 U.S. at 256, 89 S. Ct. at 1729 (dissenting opinion).

Respondent submits that the standard set forth in *Fahy, Chapman,* and *Harrington* for determining whether constitutional error is harmless has been the same standard verbalized in varying terms. Therefore, application of the Fahy standard by the Court of Criminal Appeals of Tennessee in the instant case was proper. However, if this Court should rule that the standards are not the same, respondent submits that the standard set forth in *Fahy,* no reasonable possibility the evidence contributed to conviction, is the most beneficial to criminal defendants. Therefore, a determination of harmless error under the *Fahy* standard would satisfy the standards in both *Chapman* and *Harrington. See Harrington v. California, supra,* 395 U.S. at 255, 89 S.Ct. at 1729 (dissenting opinion).

C. **The Admission Into Evidence of Items Seized During a Search Conducted in Violation of Petitioner's Fourth and Fourteenth Amendment Rights Was Harmless Error.**

The items which were seized in the search of the motel room after the shoot-out with Taylor consisted of a change purse discovered under a mattress on one of the beds and a key ring found in a suitcase (R. 312-314). The change purse contained a diamond ring and a lady's watch which had been previously identified as belonging to the female victim and the key ring contained keys to operate the male victim's automobile (R. 312-314). It is the admission of these items which was held to be harmless error by the court below. Respondent submits that the lower court's ruling was correct.

A brief summary of the incriminating evidence not tainted by a search of the motel room is offered in support of the lower court's ruling.

Beginning on November 16, 1973, petitioner Taylor and two male companions were in Atlanta, Georgia, attempting to buy

pistols (R. 7). The next day at a store where their previous attempts had been unsuccessful, one of Taylor's companions purchased three pistols, including the pistol which became the murder weapon in this case (R. 7, 9, 14, 15, 19-26, 268).

On November 27, 1973, petitioner Taylor was present at the Pitt Grill in Nashville, Tennessee, the same time the two to-become murder victims were there which was approximately one hour before their gunshot bodies were discovered a short distance from that restaurant and their motel (R. 50-57, 227-235). A short period of time after the victims' bodies were discovered, petitioner Taylor's left thumb print was discovered on a plastic glass in one victim's motel room (R. 119-124, 174).

Beginning in the morning hours of November 29, 1973, Taylor and his two companions were seen together in Memphis, Tennessee, using credit cards issued to one of the homicide victims and in the possession of and operating that deceased's automobile (R. 256-285). In the afternoon of November 29, 1973, authorities took Taylor's two companions into custody and discovered a pistol on each of them (R. 292-295, 340, 341). Immediately thereafter, a shoot-out occurred between Taylor and Memphis authorities and the pistol confiscated after Taylor surrendered was the murder weapon (R. 297-299, 307-309, 368).

Taylor's two companions in November, 1973, testified that approximately 10:30 p.m. on November 27, 1973, Taylor came into the motel room they were sharing in Nashville and announced that they were leaving town (R. 397, 398, 403, 404, 469, 476, 477). They testified that Taylor was excited and, even though they objected, he convinced them to leave Nashville (R. 404, 405, 477, 478). The three went to Memphis in a blue Lincoln Continental (the vehicle of one of the homicide victims) which Taylor told them he had purchased (R. 406, 479, 480). They testified further that Taylor was then in

possession of credit cards imprinted with the name "James P. Widener" (R. 407, 481, 482).

The brief statement of the evidence set out hereinbefore shows that Taylor was in a public place in the presence of the victims only minutes before the murders. He apparently was in the motel room of one of the victims. Taylor was in possession of the murder weapon both before and after the homicide. Minutes after the homicides occurred, he was excited and anxious to leave Nashville. At that time, he was in possession of the automobile and credit cars belonging to one of the murder victims.

Respondent respectfully submits that the untainted incriminating evidence is overwhelming and would result in a jury verdict of guilty unless the jury acted arbitrarily. Therefore, admission of the watch and ring belonging to the second homicide victim and admission of the keys which operated the automobile belonging to James P. Widener was harmless error as found by the Court of Criminal Appeals of Tennessee.

D. **The Decision of the Court of Criminal Appeals of Tennessee Should Not Be Reviewed and Reversed Because the Exclusionary Rule as Applied to the States in Mapp v. Ohio Should No Longer Be Followed and Should Either Be Overruled or Modified So as to Make Admissible the Items Seized in the Instant Case.**

All courts should seek to conduct criminal proceedings so that no innocent man suffers for want of a fair trial. However, it is submitted that every court also shares the duy to see that no guilty person escapes justice through a mere irregularity or technicality which in no way affects the determination of guilt or innocence. It is submitted that this Court should no longer require the states to adhere to the exclusionary rule in the absence of evidence to warrant the rule which presently is still unsupported by convincing evidence. *See United States v. Janis*, — U.S. —, 96 S.Ct. 3021, 3027, — L.Ed.2d — (1976).

The costs of applying the exclusionary rule have been recognized as substantial and application of the rule has often subverted criminal trials. *Stone v. Powell*, 428 U.S. —, 96 S.Ct. 3037, 3049, 48 L.Ed.2d — (1976). The respondent submits that in no way should the exclusionary rule be applied in the instant case so as to require that the conviction of petitioner Taylor be reversed.

II. **Response to Question Presented Number 2.**

A. **The Trial Court Properly Exercised Discretion in Not Striking the Testimony of Witnesses Dunn and Mason in Whole or in Part in Response to Assertion of Their Fifth Amendment Rights Not to Incriminate Themselves.**

It is widely recognized that a trial court is not required to strike testimony, in whole or in part, of a government witness asserting his Fifth Amendment privilege against self-incrimination in a criminal trial. Such recognition is expressed in *United States v. Newman*, 490 F.2d 139 (3rd Cir. 1974), where the Court also cites decisions filed in six additional circuits recognizing this same principle. 490 F.2d at 145. And, in *United States v. Rogers*, 475 F.2d 821 (7th Cir. 1973), the Court noted that a witness' refusal to answer questions upon asserting the Fifth Amendment privilege "may, but need not necessarily, violate the defendant's Sixth Amendment right as to part or all of the witness' testimony." 475 F.2d at 827.

However, the question presented does appear to be one not heretofore decided by this Court. Even though, this Honorable Court has noted that the constitutional right of confrontation

and cross-examination is not absolute. In *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), after noting that the constitutional right of confrontation was an essential and fundamental requirement for a fair trial, this Court stated:

> Of course, the right to confront and cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. *E.g.*, Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 292 (1972). But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined. *Berger v. California*, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969). 410 U.S. at 295, 93 S.Ct. at 1046.

Thus cases of conflict between a witness' Fifth Amendment privilege against self-incrimination and a defendant's Sixth Amendment right to confrontation and cross-examination require consideration of the integrity of the fact-finding process.

It is submitted that the authoritative case on this point is *United States v. Cardillo*, 316 F.2d 606 (2nd Cir. 1963), *cert. denied, Cardillo v. United States*, 375 U.S. 822, 84 S.Ct. 60 (1963) and *Margolis v. United States*, 375 U.S. 822, 84 S.Ct. 60 (1963), *rehearing denied, Cardillo v. United States*, 375 U.S. 926, 84 S.Ct. 263 (1963). The circuit court there stated:

> Since the right to cross-examine is guaranteed by the Constitution, a federal conviction will be reversed if the cross-examination of government witnesses has been unreasonably limited. . . . However, reversal need not result from every limitation of permissible cross-examination and a witness' testimony may, in some cases, be used against a defendant, even though the witness invokes his privilege against self-incrimination during cross-examination. In

> determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness' testimony may be used against him. . . . On the other hand, if the witness by invoking the privilege precludes inquiry into the details of the direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness' testimony should be striken in whole or in part. . . . 316 F.2d at 611 (authorities omitted).

In *Cardillo*, the testimony of two individuals was under consideration. The court found that the limitations on cross-examination of one of the witnesses related only to collateral matters which concerned his credibility as a witness and the limitation was proper. However, as to the second witness, the court concluded that the limitation was improper because it related to the guilt of the defendant.

The second most authoritative decision on this issue is *Fountain v. United States*, 384 F.2d 624 (5th Cir. 1967), *cert. denied, Marshall v. United States*, 390 U.S. 1005, 88 S.Ct. 1246, 20 L.Ed.2d 105 (1968). The court there noted that resolving the conflict between a witness' Fifth Amendment privilege and a defendant's Sixth Amendment right to confrontation and cross-examination began with two inquiries which are whether the Fifth Amendment privilege could be properly invoked, and if so, whether, even with this restriction, the direct testimony could

still be considered by the jury. 384 F.2d at 627. The court noted that if the limitation on cross-examination deprived a defendant of testing the truth of the direct testimony that the portion of the direct testimony which could not be subjected to sufficient inquiry should be struck. However, the court concluded that "the question in each case must finally be whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness' direct testimony." 384 F.2d at 628.

The standards for considering the integrity of the fact-finding process when a defendant's right of confrontation has been limited by a prosecution witness successfully asserting his Fifth Amendment privilege as stated in the cases of *Fountain* and *Cardillo*, both *supra*, have been recognized and applied in various circuits. *E.g., United States v. Gould*, 536 F.2d 216 (8th Cir. 1976); *United States v. Liddy*, 509 F.2d 428 (D.C. Cir. 1974) (en banc); *United States v. Newman*, 490 F.2d 139 (3rd Cir. 1974); *United States v. Stephens*, 492 F.2d 1367 (6th Cir. 1974); *United States v. Rogers*, 475 F.2d 821 (7th Cir. 1973).

At trial where the question is first presented, a witness who may properly invoke the Fifth Amendment privilege against self-incrimination should be called as a witness unless his answers to all relevant questions could subject him to prosecution. *United States v. Melchor Moreno*, 536 F.2d 1042 (5th Cir. 1976). In those instances, the witness should be required to answer all relevant questions to which the judge determines that he may not properly assert the Fifth Amendment privilege. *United States v. Melchor Moreno, supra; United States v. Anglada*, 524 F.2d 296 (2nd Cir. 1975). The trial judge acted accordingly in the case under consideration.

It is submitted that application of the *Fountain* and *Cardillo* standards to the particular facts and circumstances present in

the instant case results in a determination that the trial judge properly allowed the witnesses Dunn and Mason to assert their Fifth Amendment privilege against self-incrimination and thereby limit petitioner's Sixth Amendment right of confrontation and cross-examination and that the trial judge so limited the exercise of the Fifth Amendment privilege by Dunn and Mason that it did not affect the integrity of the fact-finding process. A review of the limited use of the Fifth Amendment privilege which was permitted by the trial judge is disclosed by the addition to the Statement of the Case contained hereinbefore.

B. No Harmless Error Rule Was Applied in the Instant Case to the Conflict Between the Witness' Fifth Amendment Privilege and the Petitioner's Sixth Amendment Right to Confrontation and Cross-Examination.

The proper test for determining conflicts between a witness' Fifth Amendment privilege again self-incrimination and a defendant's Sixth Amendment right to confrontation does not involve a determination of whether harmless error is present. As noted in the preceding discussion, the proper standard determines whether or not there has been a deprivation of a defendant's right to determine the truth of the prosecution witness' direct testimony. If a determination of the truth was not reached in the trial court, reversal is required. This standard for review is of the integrity of the fact-finding process and no application of a harmless error rule is applied when the court determines that there was no valid fact-finding process.

Although some courts do speak of harmless error in considering this issue, *e.g., United States v. Melchor Moreno*, 536 F.2d 1042 (5th Cir. 1976), and *Hoover v. Beto*, 467 F.2d 516 (5th Cir. 1972), *cert. denied*, 409 U.S. 1086, 93 S.Ct. 702 (1972), it is submitted that the proper determination, as set forth above, is consideration of the integrity of the fact-finding process, even if a court may express its decision as finding "harmless error."

The lower court in this case reviewed the evidence to determine if the fact-finding process had been impaired. The court made no finding of harmless error relative to this question and affirmed the conviction only after a full review of the trial proceedings.

CONCLUSION

For the foregoing reasons, the respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JACK E. SEAMAN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3231